

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTHER A. SANDERS,)	
)	No. CV-05-00372-CI
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR REMAND PURSUANT
)	TO 42 U.S.C. § 405(g)
JO ANNE B. BARNHART,)	
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are Plaintiff's Motion for Summary Judgment and Defendant's Motion for Remand the captioned matter pursuant to sentence four of 42 U.S.C. § 405(g), noted for hearing without oral argument on July 24, 2006. (Ct. Rec. 11, 15.) Attorney Kathleen Kilcullen represents Plaintiff; Special Assistant United States Attorney L. David Blume represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Remand pursuant to 42 U.S.C. § 405(g).

Defendant contends the matter should be remanded to permit the ALJ to further develop the record and resolve conflicts in the medical evidence. Plaintiff does not dispute that the ALJ erred but contends in her opening brief that remand should be for immediate payment of benefits. Plaintiff did not respond to Defendant's

1 Motion to Remand.

2 On May 16, 2002, Plaintiff protectively filed for Social
3 Security disability benefits and Supplemental Security income
4 benefits, alleging an onset date of January 1 or 2, 2002, due to
5 fibromyalgia and pain in her neck, arms, shoulders, wrist, elbow,
6 hips and back. (Tr. 66, 67, 79.) Benefits were denied, as was
7 reconsideration. Plaintiff requested a hearing before an
8 administrative law judge (ALJ). A hearing was held before ALJ John
9 Hood; Plaintiff was represented by her spouse. (Tr. 402.) The ALJ
10 denied benefits and that decision was affirmed by the Appeals
11 Council. The instant matter is before this court pursuant to 42
12 U.S.C. § 405(g).

13 **STATEMENT OF THE CASE**

14 Plaintiff was 58 years old at the time of the hearing, and 54
15 years old at the alleged date of onset. She had a high-school
16 education and attended a one and a half years of college. She also
17 had vocational training in cosmetology and real estate. (Tr. 85.)
18 She had past relevant work experience as a florist, baker, waitress,
19 title officer, typist and real estate agent. (Tr. 80, 413-17.) She
20 last worked in January or May 2000. (Tr. 80, 415.)

21 **ADMINISTRATIVE DECISION**

22 The ALJ found Plaintiff had not engaged in substantial gainful
23 activity since 1999. Her last date of insured was June 30, 2005.
24 (Tr. 23.) Plaintiff suffered from severe physical impairments from
25 multiple abdominal surgeries and musculoskeletal disorders related
26 to de-conditioning or generalized degenerative osteoarthritis, but
27 did not have a medically determinable mental health disorder that
28 posed any significant limitation in her ability to work. (Tr. 19,

23.) The ALJ found Plaintiff's severe impairments did not meet or equal the listings. (Tr. 23.) He concluded she had the residual functional capacity for light and sedentary work with no significant non-exertional limitations. (Tr. 20-21.) The ALJ determined Plaintiff had skilled work experience as a realtor, realtor assistant and title company clerk, with skills that would be transferable at the light and sedentary levels. (Tr. 24.) He found Plaintiff not disabled because she could perform her past relevant work at these jobs. (Id.)

STANDARD OF REVIEW

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001) the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed de novo. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed de novo, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

1 Under the Social Security Act, individuals who are
2 "under a disability" are eligible to receive benefits. 42
3 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
4 medically determinable physical or mental impairment"
5 which prevents one from engaging "in any substantial
6 gainful activity" and is expected to result in death or
7 last "for a continuous period of not less than 12 months."
8 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
9 from "anatomical, physiological, or psychological
10 abnormalities which are demonstrable by medically
11 acceptable clinical and laboratory diagnostic techniques."
12 42 U.S.C. § 423(d)(3). The Act also provides that a
13 claimant will be eligible for benefits only if his
14 impairments "are of such severity that he is not only
15 unable to do his previous work but cannot, considering his
16 age, education and work experience, engage in any other
17 kind of substantial gainful work which exists in the
18 national economy...." 42 U.S.C. § 423(d)(2)(A). Thus, the
19 definition of disability consists of both medical and
20 vocational components.

21 In evaluating whether a claimant suffers from a
22 disability, an ALJ must apply a five-step sequential
23 inquiry addressing both components of the definition,
24 until a question is answered affirmatively or negatively
25 in such a way that an ultimate determination can be made.
26 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
27 claimant bears the burden of proving that [s]he is
28 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

29 ISSUES

30 The only question is whether Plaintiff is entitled to immediate
31 payment of benefits or whether additional administrative proceedings
32 are necessary. Defendant concedes the ALJ erred in evaluating the
33 medical evidence. Plaintiff asserts the record establishes that she
34 cannot work and immediate benefits should be paid, but concedes a
35 remand for further proceedings is an appropriate alternative.

36 ANALYSIS

37 Defendant asserts the cause must be remanded to permit the ALJ
38 to properly evaluate Plaintiff's possible fibromyalgia and mental
39 impairments. Defendant further asserts there is conflicting medical

1 evidence, leaving issues that need to be resolved.

2 Case law requires an immediate award of benefits when:

3 (1) the ALJ has failed to provide legally sufficient
4 reasons for rejecting [a medical opinion], (2) there are
5 no outstanding issues that must be resolved before a
6 determination of disability can be made, and (3) it is
clear from the record that the ALJ would be required to
find the claimant disabled were such evidence credited.

7 *Harman*, 211 F.3d at 1178 (*citing Smolen v. Chater*, 80 F.3d 1273,
8 1292 (9th Cir. 1996)). Where the record is incomplete, or the
9 medical evidence has not been sufficiently evaluated, questions
10 remain regarding the severity of Plaintiff's impairments and her
11 RFC. Remand for further proceedings is appropriate when further
12 administrative proceedings could remedy defects, *Rodriguez v. Bowen*,
13 876 F.2d 759, 763 (9th Cir. 1989), or are necessary to develop a
14 sufficient record. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th
15 Cir. 1989).

16 The ALJ found "[t]he claimant's medical records are quite
17 complete, and more than adequately address the claimant's alleged
18 impairment conditions, realistically and subjectively." (Tr. 19.)
19 However, the record does not support this finding. The records
20 include a January 2002, physical therapy report from therapist
21 Douglas Harris; an unsigned June 2006, RFC assessment form and one
22 dated December 2002, by agency physician Howard Platter, M.D.; a
23 psychiatric review technique form (PRTF) reviewed by agency
24 psychologist Deborah Baldwin, Ph.D., in July 2002; a PRTF completed
25 by agency psychologist Michael Brown, Ph.D., in December 2002;
26 treatment records from Wenatchee Valley Clinic (February 1999 to
27 January 2003); a physical therapy report from Mt. Stuart Physical
28 Therapy, dated February 2003; and a medical questionnaire from Geoff

1 Richardson, M.D., dated February 24, 2004. After the hearing, a
2 consultative examination report by Fred Price, D.O., dated June 16,
3 2004, was submitted. (Tr. 2-3.)

4 Records from the Wenatchee Valley Clinic consist of numerous
5 reports from examining and treating physicians, including
6 neurologist Joseph Tornabene, M.D., who noted increasing chronic
7 pain complaints by Plaintiff and various possible diagnoses,
8 including myofascial pain disorder and fibromyalgia or polymyalgia
9 rheumatica. (Tr. 250.) Rheumatologist J. Richard Newton, M.D.,
10 later diagnosed fibromyalgia. (Tr. 251, 254.) Treating neurologist
11 Dr. Tornabene concluded Plaintiff met the historic and clinical
12 criteria for fibromyalgia. (Tr. 266, 269, 296.) Treating physician
13 Stephen Huffman, M.D., also diagnosed fibromyalgia with acute
14 trigger points and specifically opined that Plaintiff's condition
15 would render her unable to do realtor work or computer work for any
16 extended time. (Tr. 311, 323, 327.)

17 As Defendant concedes, these medical records were not properly
18 evaluated. Specifically, the opinions of treating and examining
19 physicians were not discussed, accepted or rejected with reasons in
20 accordance with the applicable legal standard. See *Lester v.*
21 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). Further, where, as here,
22 a Plaintiff was not represented by counsel, the ALJ had a heightened
23 duty to develop the record. An unrepresented claimant is entitled
24 to "scrupulous and conscientious probing" by the ALJ into all
25 relevant facts. *Vidal v. Harris*, 637 F.2d 710 (9th Cir. 1981). This
26 includes facts and circumstances that are favorable as well as
27 unfavorable to claimant. *Cox v. Califano*, 587 F.2d 988, 991 (9th
28 Cir. 1978). *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir.

1 2001).

2 The record indicates the ALJ adopted the opinions of Dr.
3 Burnell, the medical expert who testified at the hearing. (Tr. 20,
4 409.) Dr. Burnell is a consulting physician, with no speciality in
5 rheumatology or neurology. (Tr. 20, 60-62.) Reliance upon a medical
6 expert's testimony that conflicts with the unrejected opinions of
7 treating and examining specialists is error. *Benecke v. Barnhart*,
8 379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830; *Magallanes*
9 *v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989).

10 It is clear from the record that numerous medical issues are
11 unresolved. Development of the record is required before a
12 determination of disability may be made.¹ Expert testimony from a
13 rheumatologist should be taken regarding the diagnosis and severity
14 of Plaintiff's fibromyalgia.² Further, fibromyalgia is diagnosed

15
16 ¹ At the hearing, the ALJ indicated he would send Plaintiff to
17 a rheumatologist for specialized testing for fibromyalgia. (Tr.
18 420.) Rheumatology is the relevant specialty for fibromyalgia, a
19 poorly understood disease within much of the medical community.
20 *Benecke*, 379 F.3d at n.4 (citing *Jordan v. Northrop Grumman Corp.*
21 *Welfare Benefit Plan*, 370 F.3d 869, 873 (9th Cir. 2004)). The post-
22 hearing report upon which the ALJ relied, however, is by Fred D.
23 Price, Doctor of Osteopathic Medicine, speciality unknown. It does
24 not appear that specialized fibromyalgia testing was conducted.
25 (Tr. 385-95.)

26 ² Dr. Burnell testified that he had "little faith in pressure
27 points, tender points." (Tr. 409.) However, as noted by the Eighth
28 Circuit in *Brosnahan v. Barnhart*, 336 F.3d 671, 672 (8th Cir. 2003):

1 primarily by a claimant's report of symptoms, and while the American
2 College of Rheumatology has issued diagnostic criteria, there are no
3 laboratory tests to confirm the diagnosis. *Benecke*, 379 F.3d at
4 590; *see supra*, note 2. Therefore, Plaintiff's credibility is a
5 significant issue in this matter and should be completely assessed
6 once additional evidence is evaluated. Clear and convincing reasons
7 must be given to reject Plaintiff's statements. *See Thomas v.*
8 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *Morgan*, 169 F.3d at
9 600 (specific reasons for credibility findings must be articulated
10 and "grounded in the evidence"). Lay testimony must be considered
11 and discounted with reasons germane to that witness. *Dodrill v.*
12 *Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). On remand, vocational
13 expert testimony should be taken at step four and, if necessary, at
14 step five. Plaintiff may raise additional issues and submit
15 additional evidence.

16 CONCLUSION

17 Enhancement of the record is warranted in this matter. Remand
18 is appropriate to remedy the defects in the original administrative
19 proceedings. Accordingly,

20
21 Fibromyalgia, a chronic condition recognized by the
22 American College of Rheumatology (ACR), is inflammation of
23 the fibrous and connective tissue, causing long-term but
24 variable levels of muscle and joint pain, stiffness, and
25 fatigue. Diagnosis is usually made after eliminating other
26 conditions, as there are no confirming diagnostic tests.
27 According to the ACR's 1990 standards, fibromyalgia is
28 diagnosed based on widespread pain with tenderness in at
least eleven of eighteen sites known as trigger points.
Treatments for fibromyalgia include cold and heat
application, massage, exercise, trigger-point injections,
proper rest and diet, and medications such as muscle
relaxants, antidepressants, and anti-inflammatories. See
Jeffrey Larson, *Fibromyalgia*, in 2 *The Gale Encyclopedia*
of Medicine 1326-27 (Jacqueline L. Longe et al. eds., 2d
ed. 2002).

IT IS ORDERED:

1. Defendant's Motion for Remand (**Ct. Rec. 15**) is **GRANTED**; the cause is **REMANDED** for additional proceedings pursuant to sentence four of 42 U.S.C. § 405(g) and consistent with the decision above;

2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is **DENIED in part**;

3. Any application for attorney fees may be filed by separate motion.

4. The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

DATED July 31, 2006.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE